Gary A. Dodge (0897)
Phillip J. Russell (10445)
HATCH, JAMES & DODGE, P.C.
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
Telephone: (801) 363-6363
Email: gdodge@hjdlaw.com
prussell@hjdlaw.com

Attorneys for UAE and Sustainable Power Group

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Rocky Mountain Power for Approval of Solicitation Process for Solar Photovoltaic and Thermal Resources	Docket No. 18-035-47

INITIAL COMMENTS OF UTAH ASSOCIATION OF ENERGY USERS AND SUSTAINABLE POWER GROUP REGARDING PROPOSED SOLAR RFP

The Utah Association of Energy Users ("UAE") and Sustainable Power Group ("sPower") appreciate the opportunity to submit comments to the Public Service Commission of Utah ("Commission") with respect to the Application for Approval of Solicitation Process for Solar Photovoltaic and Thermal Resources ("Application") filed by Rocky Mountain Power ("RMP" or "Company") in this docket. Pursuant to the Scheduling Order issued by the Commission in this docket, UAE and sPower submit the following initial comments.

INTRODUCTION

The Application seeks approval of a solicitation process referred to as the 2019 Renewable Resources Utah Request for Proposals ("RFP"). The Application is the first to seek approval of a solicitation process pursuant to Utah Code § 54-17-807 ("Act") and Commission Rule R746-450-3 ("Rules"), enacted in 2018. As such, it is important that this RFP be carefully

evaluated for full compliance with the Act. As set forth below, UAE and sPower submit that the RFP as submitted for approval in this docket fails to comply with the requirements of the Act and the Rule, and that certain changes must be made to the proposed RFP to ensure a fair solicitation process in compliance with Utah law.

INITIAL COMMENTS

1. Requirement for a Build Transfer Bid. The proposed RFP specifies that, in addition to a power purchase agreement ("PPA") bid, a bidder is *required*, rather than *allowed*, to also submit a bid for a "Build-Transfer" arrangement ("BTA") to sell the solar project to RMP prior to commercial operation (see, e.g., RFP Sections 1, 2, 4.B, Appendix F-2). This requirement should be stricken. It is anti-competitive and inconsistent with the requirements of the Act and the Rules that bidders and RMP must be placed on an equal footing.

sPower and UAE understand that the customers for whom the solicitation is to be issued ("Affected Customers") have the right under the Act and the Rules to determine the criteria for evaluation of a solicitation. However, a solar solicitation approved in this docket will be the first solicitation approved under the Act and the Rules, and could provide a template for future solicitations. It is thus important that this solicitation be fair and reasonable and ensure a level playing field. Moreover, in order to protect the integrity of the solicitation process and to protect competition, the Act and the Rules require as a prerequisite to approval of *even a Specific Customer Solicitation* like this one, that the Commission must first determine that the solicitation process "will create a level playing field in which the qualified utility and other bidders can compete fairly" (Utah Code § 54-17-807(6)(b)); will "create a level playing field that will allow fair competition between the qualified utility and other bidders" (R746-450-3(2)(a)(i)(A)); and is "in the public interest" (R746-450-3(2)(a)(i)(D)).

The Act and the Rules effectively permit RMP to submit a competing PPA bid to be evaluated fairly and comparably with all other bids. They clearly do not contemplate that RMP can require bidders to include an option for RMP alone to purchase any project that is bid into the solar solicitation. Such a requirement would clearly not put bidders and RMP on a level playing field—no other bidder is being offered a similar purchase option.

The business model for some solar developers is to develop a project to a point when a PPA has been executed, and then sell it to another entity to construct, own and operate the facility. The business model for other developers is to develop and construct a project, but not to own or operate it long term. Yet others want to develop, construct, own and operate solar projects. Each developer should be permitted to submit a bid consistent with its business model to develop, construct, own and/or operate solar projects. Forcing a bidder to submit a proposal to sell its project in a manner inconsistent with its business model unfairly penalizes the developer, provides RMP with an unfair competitive advantage, and will lead to higher bid prices.

It may be true that the Affected Customers and a developer could properly agree in arms-length negotiations to an arrangement in which RMP (or anyone else) might be given an option to purchase and own the solar project for a specified price, but no developer should be forced to offer a bid that includes a sale to RMP if the developer is not interested in selling its project. Moreover, if a BTA option is going to be allowed or required, that option should not automatically extend to RMP alone; all developers should be given a similar option to purchase a project so that the most competitive owner can be determined. That is the only way to put RMP and other bidders on an equal playing field, and the only way to identify the lowest-cost resource options for customers.

2. Evaluation of PPA, Purchase Option and BTA. The solicitation does not describe how PPAs will be evaluated in comparison to BTAs. A prerequisite for approval of a solicitation under the Rules is that the solicitation must adequately describe "the criteria and the methods to be used to evaluate bids" (R746-450-3(1)(d)). The draft RFP generally describes price and non-price factors to be evaluated, but it fails to describe how a PPA will be compared to a PPA with a purchase option and/or to a BTA. This is a critical omission.

PPAs will be bid in terms of $/MWh and BTAs will be bid in terms of dollars. The only way to compare the two types of bids is to turn a BTA dollar bid into a $/MWh basis by applying a return on investment required by the owner. RMP should certainly not be given the unfair competitive advantage of seeing all of the PPA proposals and then searching through the BTA proposals for those to which it can apply an undisclosed acceptable return so that it can purchase and own the facility. Such a right would clearly not put RMP and other bidders on an equal playing field. Rather, it would give RMP a huge and unfair competitive advantage over all other bidders; an advantage that is expressly forbidden by the Act and the Rules.

The draft RFP also permits bidders to include a purchase option in a PPA bid. Some type or renewal or purchase option is likely important—perhaps critical—to a fair and even-handed comparison of PPAs and BTAs with different term lengths. However, the renewal or purchase options should not be in favor of RMP, but rather should be for the benefit of the Affected Customers, regardless of by whom the resource is ultimately owned. It would certainly not put RMP, as a competitive market-based bidder, on an even playing field with other bidders if RMP alone has an option to purchase a market-price-based solar resource during or at the end of the term.

The Affected Customers are presumably interested in identifying the lowest possible cost resources, whether in the form of a PPA, a PPA with a purchase option, or a BTA. However, it is not appropriate for RMP alone to have the option to exercise the option to acquire the resource. If the goal is to identify the lowest cost option for the Affected Customers, RMP and each bidder should be permitted to make a confidential bid specifying the return that it would require if it were allowed to own and operate a solar facility constructed by the qualified bidder with the lowest BTA price. Only this type of process will give the Affected Customers all of the information they need to choose the true lowest cost option. i.e., the lowest $/MWh PPA price submitted by any bidder compared to the lowest cost $/MWh PPA price resulting from an option to purchase the solar facility at the lowest acceptable return on investment.

sPower and UAE understand that the Affected Customers have signed some type of agreement for the Company to administer the RFP on their behalf. While the Affected Customers are presumably free to do so, such a contract creates inherent conflicts of interest and the potential for an unequal playing field as mandated by the Act and the Rules. This is particularly true if a BTA bid is required and RMP desires to own the solar resource, as it clearly does. This inherent conflict of interest makes it all the more critical that bidders and the Commission must fully understand how PPAs, PPAs with purchase options, and BTAs will be compared and evaluated, and that the Affected Customers be put in a position to identify the best proposals. Indeed, that is the only way that the Commission can possibly determine that RMP and other bidders are on an even playing field and that the integrity of the competitive process has been protected.

3. Discount and Return Rates. The solicitation fails to identify the return on investment or discount rate(s) that will be used to evaluate different types of proposals. The solicitation should inform bidders how PPAs, PPAs with purchase options, and BTAs will be compared within categories and between categories to ensure that they will be properly and fairly evaluated and compared. If a BTA in favor of RMP alone is permitted or required, the return that will be applied to the BTA price should be specified. Moreover, a fair process must disclose how different contract term lengths will be compared, including the discount rate that will be used to determine comparative net present values. Also, the discount rate should be determined by the Affected Customers, as it is the customers' cost of capital that is relevant here, not RMP's. While the Affected Customers are free to set the evaluation criteria, the Rules require that all evaluation criteria and methods must be specified in the application for approval of a solicitation (R746-450-3(a)(d)), and such information is critical to assure a fair process and to incent developers to spend the considerable time and effort necessary to prepare and submit bids.

4. Interconnection and Transmission. UAE and sPower seriously question the wisdom of the proposed deadlines relating to interconnection and transmission as specified in Section 5.B. of the RFP. These timing restrictions will create a very strong likelihood that many otherwise-available and competitive projects will be eliminated from consideration, likely leading to higher prices. The 2017-2018 Wyoming wind docket (17-035-40) demonstrated the dramatic extent to which early interconnection and transmission deadlines can impact the available pool of competitive projects.

A description of the interconnection and transmission process may help illuminate the serious problems created by the draft RFP. As of the commercial operation date, a project must be interconnected with PacifiCorp's transmission system and RMP must have secured firm

transmission service for the project. Part IV of PacifiCorp's Open Access Transmission Tariff ("OATT") describes the process by which an Interconnection Customer—the bidder in this instance—must apply for interconnection services from PacifiCorp's transmission function ("PacTrans"). Even when a bidder ultimately receives interconnection services through an executed Large Generator Interconnection Agreement ("LGIA"), there is no guarantee that PacTrans will also have network transmission services available for the project.[1] RMP must apply for and obtain transmission service for that energy and capacity. Part III of PacifiCorp's OATT describes the process by which the Network Customer—RMP in this instance—applies for and obtains Network Integration Transmission Service for generating resources that it owns, purchases, or leases. As discussed below, these processes take considerable time.

The RFP requires that bidders must have reached a certain stage of development for the interconnection process by the March 29, 2019 deadline for submission of a bid, and to reach an even further stage of progress by the April 24, 2019 date by which best and final offers will be submitted by bidders selected into the initial shortlist.[2] Specifically, the initial bids to be submitted no later than March 29, 2019 must include

> evidence that the proposed project has either: (1) requested a direct interconnection with PacifiCorp's transmission system and executed an interconnection feasibility study or system impact study (SIS) agreement with PacifiCorp's transmission function; or (2) requested interconnection with a third party's system, executed an interconnection feasibility study agreement with the third party transmission provider, and requested long-term, firm third-party transmission service from the resource's point of interconnection with the third party's system to the proposed point of delivery on PacifiCorp's system.[3]

[1] *See, e.g.*, OATT Section 37.4.
[2] *See* RFP Section 3.A (Schedule) at 5.
[3] *See* RFP Section 5.B (Direct Interconnection or Third Party Interconnection and Transmission Service) at 17.

Less than one month after these bids are submitted, those selected to the initial shortlist will be asked to provide best and final offers by April 24, 2019 and must have

> a completed interconnection system impact study (SIS) (for projects directly interconnected to the Company's system) or a completed third-party interconnection SIS and a completed third-party transmission service study (for projects using third-party transmission) to determine the actual direct assigned cost for the interconnection or transmission services.[4]

The process for obtaining a completed interconnection SIS can take many months. As described in part IV of the OATT, a bidder must first submit an Interconnection Request to PacTrans,[5] and within 30 days participate in a scoping meeting.[6] Within 40 days of the scoping meeting, the bidder must send a completed Feasibility Study Agreement to PacTrans, which must include certain technical data about the project,[7] which can take many months to develop. This is the stage of development a bidder must reach by March 29, 2019 in order to meet the minimum eligibility requirements to submit a bid into this RFP.

Once a bidder submits a Feasibility Study Agreement, PacTrans then uses reasonable efforts to complete the Feasibility Study within 45 days,[8] though the OATT does not include an enforcement mechanism if PacTrans fails to do so. When PacTrans completes the Feasibility Study, it provide the bidder with an Interconnection System Impact Study ("SIS") Agreement.[9] The bidder must submit a completed Interconnection SIS Agreement to PacTrans within 30 days,[10] and PacTrans uses reasonable efforts to complete the SIS within 90 days, although, again,

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[4] *See* RFP Section 5.B (Direct Interconnection or Third Party Interconnection and Transmission Service) at 18.
[5] *See* OATT Section 38.1.
[6] *See* OATT Section 38.3.
[7] *See* OATT Section 41.1.
[8] *See* OATT Section 41.3.
[9] *See* OATT Section 42.1.
[10] *See* OATT Section 42.2.

the OATT contains no enforcement mechanism.[11] This is the stage of development a bidder must reach by April 24, 2019, in order to meet the eligibility requirements in the RFP to provide best and final pricing.

The bottom line is that only developers with projects already far along in the development/interconnection process can possibly meet the suggested timing requirements. Moreover, other proposed RFP requirements suggest that even a bidder with a completed Interconnection SIS by the April 24, 2019 deadline may not have a sufficiently-advanced project. The RFP requires commercial operation between June 30, 2020 and December 13, 2021. Even a project with a completed Interconnection SIS by April 24, 2019, may well struggle to achieve commercial operation by December 13, 2021 because of timing constraints dictated by PacTrans. For example, if either the Interconnection SIS or any subsequent transmission study shows that network upgrades are necessary for the project to obtain Network Integration Transmission Service, that commercial operation date may well be impracticable.

In addition to these timing limitations, the interconnection queue itself will likely also present significant hurdles for many bidders. As the Commission may recall from lengthy discussions on the topic in prior QF dockets and the Docket 17-035-40, every project that submits an interconnection request is placed in the interconnection queue in the order in which the interconnection request is made. The vast majority of projects that submit interconnection requests are never built. Nonetheless, PacTrans conducts interconnection and transmission studies that assume that all projects in the interconnection queue will be built. This OATT-based assumption means that there is theoretically, even if not practically, less transmission capacity

[11] *See* OATT Section 42.4.

available for PacTrans to deliver the capacity and energy for each successive project in the interconnection queue. In Docket No. 17-035-40, this theoretical limitation of transmission capacity meant that the only bidders into the 2017R Wind RFP who qualified were the very few projects with advanced interconnection queue positions—most of which were owned by PacifiCorp. Because PacTrans is required to assume that all projects in the interconnection queue will be built, and must anticipate transmission service for all of those projects, projects bid into the 2017R Wind RFP with less advanced queue positions triggered the supposed need for massive network upgrades that made those projects uneconomic and non-viable. While PacifiCorp did not create the interconnection queue, it is by far in the best position to take advantage of it.

For these reasons, UAE and sPower believe that the RFP, as proposed, will yield relatively few responsive bids that can meet the timing requirements set forth therein. This may, in part, be a result of deadlines suggested by the Affected Customers. While the Affected Customers are free to set timing restrictions, they should clearly understand the tradeoffs of such constraints, including the potential for a dramatic reduction in the pool of potential projects, with a resulting likelihood of higher-priced bids. Moreover, Utah Code § 54-17-807(6)(b) mandates that the timing and interconnection requirements must produce a level playing field among bidders

In all solar solicitations, the Commission should ensure that interconnection and transmission-related constraints—the elimination of which is largely within PacifiCorp's control—cannot be used as anti-competitive tools by RMP. The Company should, for example, explain how it will avoid bias in submitting transmission service requests to PacTrans related to bids evaluated in the RFP, so that certain projects are not favored in that process over others.

This is especially important when, as here, the Company is asking for an option to acquire any projects that are bid in. A process that would allow the Company to favor a project that it wants to purchase over another project that it does not want to purchase through the use of strategically-timed transmission service requests would certainly not create a level playing field.

Finally on this topic, Section 5.B. of the RFP imposes on developers the risk of any increase in costs between projected and actual directly-assigned interconnection costs, while requiring a reduction in the PPA price for any decrease in actual vs projected costs. This type of unequal treatment tends to discourage bidding.

5. Bid Fairness and Bid Information. The RFP as proposed will allow the Company to act in ways that provide it with a competitive advantage. For example, as proposed, RMP could choose to bid a market-based project into the RFP; could choose an RFP with a purchase option in its favor; or could choose to acquire any project bid through the mandatory BTA. At the same time, RMP intends to evaluate the bids and select the winners. This presents clear conflicts of interest that preclude a level playing field between the Company and other bidders.

To ensure fairness, any market-based project bid by RMP, any proposed self-build option, and any proposal for the exercise of an option to purchase a project under a PPA bid or under a BTA bid, should be submitted in advance by RMP and "locked down" in an independently verifiable manner before RMP receives any bids from others. Thereafter, RMP should not be permitted to alter its bid or exercise any purchase options or other rights, unless the same options and rights are extended to all bidders.

In addition, the Company should be precluded from using information from bids submitted into the RFP to gain a competitive advantage, whether in this RFP or any subsequent solicitation process. The Company claims in its Application that the internal Company team

evaluating bids will be kept separate from any team that may present a Company bid. This is essential, but insufficient. All confidential or proprietary information in any bid submitted must indefinitely be kept away from anyone within the Company who may be involved in preparing, presenting or evaluating any future Company bids, to prevent the Company from gaining an inherent competitive advantage. The Company should be required to explain in detail how all bid information will be effectively quarantined so that the Company cannot use it—either in this RFP or in a future RFP—to gain a competitive advantage.

6. Confidentiality. The confidentiality protections in the draft RFP are also inadequate. The language in Section 2 of the draft RFP dealing with Appendix E-1 states that RMP will use "reasonable efforts" to protect information marked as confidential, but it then purports to eliminate any potential RMP liability for improper disclosure—regardless of the cause—rendering any purported confidentiality commitment illusory. Moreover, Section I of the draft RMP states only that RMP will "attempt" to maintain confidentiality.

The draft RFP also states that all information submitted by bidders will become RMP's "property," without adequately ensuring that the bidders' proprietary information will be adequately protected and will remain the property of the bidders. Moreover, the definition of "Confidential Information" in Appendix G of the draft RFP is insufficiently broad; it should expressly include detailed non-financial project-specific information required to be submitted by the RFP. Additional confidentiality protections should be added to avoid a chilling effect on bidders.

7. Litigation. Section F.9 of the draft RFP excludes a bidder that is in, or has threatened, material litigation with PacifiCorp. Again, while the Affected Customers are free to choose evaluation criteria that may disqualify certain bidders, they should understand the

implications of the same. It would make more sense in this context to disqualify bidders in material litigation with the Affected Customers.

In any event, such a requirement should not be permitted in a specific customer solicitation by a customer that desires to identify the most competitive options, or in any all-customer solicitation. In the normal course of business, companies must sometimes resort to litigation to enforce rights—particularly against a monopoly. RMP should not be permitted to disqualify developers simply because they have resorted to litigation of one type or another against PacifiCorp, or more unfairly, because PacifiCorp has initiated litigation against them. Finally, while the draft RFP excludes from disqualified litigants those in proceedings before state regulatory commissions, the same exclusion is not offered for those in litigation at FERC. There is no reasonable justification for these exclusionary provisions from a customer/ratepayer perspective.

8. Sole Discretion. Throughout the RFP, RMP purports to retain the right to make certain decisions and determine various things in its "sole discretion." These references should be removed or modified, as they tend to chill the willingness of developers to submit bids, particularly in light of RMP's obvious desire to own the resulting solar project. These resources are being solicited on behalf of the Affected Customers who are taking the primary financial risk of the same, and not RMP. The role of the Affected Cities in setting evaluation criteria and in choosing winning bids should be explained and emphasized, and language purporting to allow RMP to make decisions or reject bids in its sole discretion should be eliminated or clarified.

In addition, the Non-Reliance letter attached to Exhibit G of the draft RFP which must be signed by short-listed bidders is overly-broad. It purports to give RMP "sole discretion" to accept or reject any proposal and to develop "a cost-based, self-build alternative." This type of

bid-chilling language should be tempered to state that the Affected Customers will decide whether or not to accept any bids and that any RMP self-build alternative would require separate Commission procedures and approvals.

9. Resource Size. The Solicitation seeks projects with a minimum size of 20 MW and a maximum of 205,000 MWh. While the Affected Customers are free to set desired resource parameters, UAE and sPower suggest that the solicitation should allow more flexibility in the total number of MWh that can be offered so that the Affected Customers can properly understand the tradeoffs between project size and project economics. While it may be appropriate to require pricing for a project that produces no more than 205,000 MWh, pricing for larger projects should be permissible. This flexibility will allow the Affected Customers to understand size/price tradeoffs, and could also provide a potential for yet other customers to potentially join in to support a larger project and secure the most advantageous pricing for all concerned customers.

10. Tax and Accounting Implications. The solicitation should confirm that any PPA bid will be structured so as to ensure that all tax benefits of a selected PPA proposal will inure to the benefit of the developer. A structure that would result in RMP being the tax owner of a PPA proposal is unacceptable.

The solicitation states that potential implications of book and tax lease treatment or variable interest entity treatment for a PPA with a term of more than 20 years will be taken into account, but it fails to explain what factors will go into such a determination or how the resulting implications will be evaluated. If a 25-year PPA might trigger disadvantageous tax consequences, it is not clear why a term of up to 25 years is being requested. The solicitation should include an adequate explanation of the factors that will be taken into consideration by

PacifiCorp's accountants in making determinations as to book and tax lease accounting treatment and variable interest entity treatment, and the implications of the same. Otherwise, bidders are left without the information necessary to make an informed decision whether to pay a bid fee for a 25-year PPA, or whether such a bid might result in RMP ownership of the facility. Further clarity is necessary.

CONCLUSION

UAE and sPower respectfully ask the Commission to require RMP to modify the draft RFP as discussed herein to ensure that RMP will not enjoy a competitive advantage in connection with market-based solar resources as required by the Act and the Rules.

DATED this 13h day of February 2019.

Respectfully submitted,

HATCH, JAMES & DODGE

*/s/ Phillip J. Russell*_____
Phillip J. Russell
Attorneys for UAE and Sustainable Power Group

Certificate of Service
Docket No. 18-035-47

I hereby certify that a true and correct copy of the foregoing was served by email this 13th day of February 2019 on the following:

ROCKY MOUNTAIN POWER

Yvonne Hogle	yvonne.hogle@pacificorp.com
Jacob McDermott	jmcdermott@pacificorp.com
Jana Saba	jana.saba@pacificorp.com

DIVISION OF PUBLIC UTILITIES

Patricia Schmid	pschmid@agutah.gov
Justin Jetter	jjetter@agutah.gov
Chris Parker	chrisparker@utah.gov
William Powell	wpowell@utah.gov
David Williams	dwilliams@utah.gov

OFFICE OF CONSUMER SERVICES

Steven Snarr	stevensnarr@agutah.gov
Robert Moore	rmoore@agutah.gov
Michele Beck	mbeck@utah.gov
Cheryl Murray	cmurray@utah.gov

UTAH CLEAN ENERGY

Hunter Holman	hunter@utahcleanenergy.org
Kate Bowman	kate@utahcleanenergy.org
Sarah Wright	sarah@utahcleanenergy.org

WESTERN RESOURCE ADVOCATES

Sophie Hayes	sophie.hayes@westernresources.org
Nancy Kelly	nkelly@westernresources.org
Steven Michel	smichel@westernresources.org

SALT LAKE CITY

Megan J. DePaulis	megan.depaulis@slcgov.com
Tyler Poulson	tyler.poulson@slcgov.com

VK CLEAN ENERGY PARTNERS LLP

Engels J. Tejeda	ejtejeda@hollandhart.com
	slclitdocket@hollandhart.com
Michelle Brandt King	mbking@hollandhart.com
Abby Birggerman	acbriggerman@hollandhart.com

/s/ Phillip J. Russell
Phillip J. Russell